Mr. Glick: I object to the question.

The Court: Overrule the objection.

Q. (Continued) Do you know how it is tested (154) for its voltage, the voltage that it will resist? A. Not exactly. I know we send them in to get them tested.

Q. How often do you send them in or did you send them in when you were with Hoosier?—

Mr. Glick: If Your Honor please, I don't see how that could possibly be germane.

Q. (Continued) —Prior to this occasion?

Mr. Glick: I don't see how that could possibly be germane. How often they sent them in would not make any difference.

Mr. Gingher: I think it is to show the element of care which was being used for protection.

The Court: I will overrule the objection.

A. I believe it is three to four months; might be longer.

Q. Might it be less? A. Could be less.

Q. Could be less. But in any event, you do send them in with some regularity for inspection, to see that they are in good condition? A. Yes, sir.

Q. Now, in this work, Mr. Creasy, you had delivered to the job the material, that is, when you first went on the job; is that right? (155) A. It was delivered to me.

Q. The material was delivered to you as the foreman on the job? A. That's right.

Q. Now, let's take first the pole. In what form was that delivered to you? A. Come in on a pole truck and a trailer.

Q. Is there anything attached to the pole when it first comes in? A. Nothing.

Q. Now, do the crossarms come in—do they come to you? A. Yes, they come to me.

Q. And how are they delivered, by truck? A. That's right.

Q. Now, will you describe to the jury a crossarm? A. Well, a crossarm is a long piece of wood, 4 inches and a half wide and 8 feet long.

Q. Well, when you say four inches and a half wide and eight feet long, it is different dimensions on different sides. It is four and a half inches by what? A. Four and a half by three. I'm not sure.

Q. Which side is up and down, the three inch? A. No, the wide side.

(156) Q. Is up and down. What is the surface on the top that you would stand on, what width is that? A. I would say three inches.

Q. Now, does that have any holes in it? A. Yes, sir.

Q. What holes are there in it when it comes to you? A. It has six holes in it, three on each side from the center, for pins.

Q. Three on each side out on—as it would be on the pole, there would be three on each side of the pole; is that right? Is that what you mean? A. Some of them have four.

Q. How many were in this pole in question? A. Well, I believe most of them were four-pin arms; that is from center.

Q. Now, how is it attached to the pole? Is there a hole in the center or do you make the hole at the scene? A. No, it has a hole in the center.

Q. Do you drill any holes in it at all? A. We make double arms out of them.

Q. Beg pardon? A. We make double arms out of them, or dead end on them.

(157) Q. Now, this was a double-arm situation, wasn't it? A. That's right.

Q. So that you had to bore holes in the crossarms? A. That's right.

Q. And you did that before it was moved up on the pole; is that right? A. That's right.

Q. Now, who would do that? A. We lay two of them together on the ground, take a brace and bit, measure off a space, bore the hole.

Q. Now, do you go through both of them at the same time? A. Both arms at the same time.

Q. Now, when you erect the pole, are the crossarms on the pole, or are they placed on the pole after it is erected? A. I set the pole first.

Q. You set the pole first. Now, by that, you dig the hole for it. Does your crew do that? A. No. We bore the holes in the arm.

Q. Now, the hole for the pole in the ground, do you dig that hole that the pole is set in? A. At times; not all the time.

(158) Q. Did you, on this job? A. I believe I did.

Q. So that you and the men working for you, of whom Luther was one, dug the holes and you set the pole?

Mr. Glick: Now, if Your Honor please, I object to that because it connotes the fact that Luther did any digging of the holes.

Mr. Gingher: I said the crew of which Luther was one.

The Court: I will overrule the objection.

Q. Do you know whether Luther assisted in digging the hole? A. I don't think I had linemen to dig the hole. I had some helpers, what we call "helpers".

Q. All right. Did the linemen help put the pole in place? A. They put it in place.

Q. The linemen actually put the pole in place. How do you support it? A. Winch line and an A frame on a truck.

Q. Well, do you have any permanent lines that hold it in position that run from the pole down? A. No.

Q. In other words, it sets in the hole and that is sufficient? (159) A. No. We use pikes after we get it in the hole.

Q. Now, what are pike poles? A. They are long pieces of wood with a sharp point on the end of it, steel point made for these wooden handles.

Q. What do you do, drive those down against the pole into the ground? A. No, we stick them in the pole and we straighten the pole up and let them hold it.

Q. So you have supports coming up the pole? A. That's right.

Q. How many of those do you put in? A. We generally use four.

Q. Now then, after you have done that, you have the pole set, then the next job is to install the crossarm? A. Yes, sir.

Q. Now, the men have handled the crossarm for the purpose of drilling the holes, and you have observed them, have you not? A. That's right.

Q. You have seen the crossarm and it is handled for the purpose of drilling the holes? A. That's right.

(160) Q. That's right. Then after the holes are drilled and the pole is set, then the men go up, first, to place the crossarms; is that right? A. That's right.

Q. And they handle the crossarm as they are going up the pole and putting it in position; is that right? A. Yes, sir.

Q. Now, the first thing they do, as I understand it, is to bolt it in in the center of the crossarm, by the bolt? A. Yes, sir.

Q. Now, in this case, where you had a double, you did that on both sides of the pole? A. Yes, sir.

Q. So, you have two crossarms running parallel to each other, one on each side of the pole; is that right? A. That's right.

Q. Now, after you do that, it is necessary, is it not, to bolt the crossarm, the two crossarms together at the ends? A. Yes, sir.

Q. When do you make the hole for that? A. That is before it goes up the pole.

Q. You make that hole. Do you drill that hole? (161) A. No, sometimes that comes right.

Q. Do you remember what the situation was in this particular case? A. They were bore in them.

Q. Now, when the man gets up there, he has to, of course, work with the crossarm against the pole, in order to bolt it into the pole in the center; that is right, isn't it? A. That's right.

Q. Then he has to bolt it on both ends? A. That's right.

Q. That is true, isn't it? A. That's right.

Q. And then there is another metal arm that supports that crossarm, is there not? A. No. It is a wood arm.

Q. A wood arm. How does that support the crossarm in its position to hold it there? A. Comes down in a V-shape, two wood—what we call wood braces.

Q. It comes down at a point below the crossarm and starts it from the pole up to a crossarm? A. That's right.

Q. Where does it hit the crossarm with respect to the center? (162) A. It goes out past the first pin hole.

Q. And, of course, the men place that in position after the crossarm is installed on the pole; is that true? A. No, we put it on on the ground.

Q. You put this support on on the ground? A. That's right.

Q. Do you have to drill a hole for that? A. No, that comes drilled.

Q. That comes drilled, but you do have to attach it to the pole? A. That's right.

Q. And these supports were on this particular pole, were they not, on the crossarm? A. Yes, sir.

Q. Now, would you have four for a double crossarm? A. At times we use four and other times we use two.

Q. What did you use in this case? A. I would hate to say.

Q. Would it help you to look at the picture? A. It probably would. (Looks at picture.) Well, you can't tell.

Q. You can't tell by the picture? So, you (163) aren't sure whether you had two or four? A. I know it is at least two.

Q. At least two; and maybe four? A. Maybe four.

Q. Now, I hand you what has been marked for identification as Defendant's Exhibit B, and ask you to look at that and see if that will help you in determining whether there were two or four? A. Well, it show two on it, two on each double arm.

Q. Now, I see on this wire coming down, is that not a supporting wire from up between the two? A. That is what we call an 11,000 guy wire, with a wood breaker in it.

Q. An 11,000 guy wire. Now where does that go? A. That goes to an anchor back in the field, maybe twenty feet away from the pole; maybe thirty feet.

Q. Now, how many of those were on the pole? A. That I would hate to say.

Mr. Glick: If Your Honor pleases, it is all very interesting, but I don't see how all of this is material to this matter.

Mr. Gingher: We think it is very material.

The Court: You made an observation, not an (164) objection. If it is an objection, I will overrule it.

Mr. Glick: It is in the form of an objection, sir.

Q. Now, which crossarm is put up first? A. The top one.

Q. And then you come on down? A. That's right.

Q. Now, is there other hardware that needs to be attached? A. Yes, sir.

Q. What is that hardware? A. Well, it depends on what you're doing. If you're going straight through, you have to put pins and insulators on it, and if you are dead-ending—

Q. Were you dead-ending on this pole? Tell us about the hardware. A. Takes long bolts to go through the arm, plus what we call a clevis that holds this insulator to keep the hot wire from getting shorted out.

* * * * * * * * * * *

Statement of District Court to Jury.

(360) The Court: Ladies and gentlemen of the jury, some of you were on my jury the other day when I informed you that at the close of every case there arises a question of law where the court must decide upon the sufficiency of the plaintiff's case as a matter of law. Such a question has arisen in this case. It has, as a matter of fact, been anticipated by me almost from the inception of the case.

The court has duties to perform and juries where they hear cases or sit in deliberation on cases, have duties to perform. These duties are not always the most pleasant duties that we are called on to perform.

The American courts are great institutions. They are open at all times to all persons to file actions in cases in which that particular court has jurisdiction, in which they may seek redress of wrongs. There is no screening process or no point at which it can be determined that one case not be filed or that it should be filed, and that screening process comes only at a point like this in the trial and then this

court must determine, as a matter of law, whether or not there is sufficient basis for the case to go to the jury.

I share with you what I know to be your natural sympathies in this case. The plaintiff in this case has (361) been seriously and permanently injured through the accident that occurred here. Your sympathies may be somewhat alleviated, if you understand that the plaintiff was working for the Hoosier Engineering Company and that that company was compelled to and did subscribe to the workmen's insurance fund, which is known as the Workmen's Compensation Act.

So the plaintiff in this case has been compensated to the extent that is provided for in the Workmen's Compensation Act.

I merely mention that so when you leave here you will understand that and know that. If the defendant in this case were negligent and had caused the plaintiff's injuries, the fact that he had received workmen's compensation, would have no effect in this case and would not be a matter to be taken into consideration in your judyment or in your verdict. I desire to leave that thought with you.

Now, legally the situation is in this case that the Hoosier Engineering Company is what is known as an independent contractor and the Ohio Power Company is what you might term the owner in this case, and it had made a contract with the Hoosier Engineering Company to do this installation, and so the plaintiff in this case was working for the Hoosier Engineering Company in assisting (362) it in performing its contract. Being injured while in the employ of the Hoosier Engineering Company, he, as I have said before, was entitled to workmen's compensation But the Ohio Power Company could only be liable in the event that it had

done some negligent act, that is, committed some act of negligence which had resulted in the plaintiff's injuries.

I have searched the evidence carefully, and the claim made by the plaintiff is that the defendant, Ohio Power Company, furnished the material, furnished a pole and crossarm which had been creosoted. That seems to be the standard practice for utility companies to use creosoted poles and crossarms for preservation of their equipment. While, if that is wrong, they would not be justified in doing it, at the same time long practice that is so universally done, raises a very grave question as to whether or not the court should say they should not do that and all over the country they would have to stop creosoting their equipment.

But the essential element of this case is, that an owner company is not liable for work done by an independent contractor unless it has committed some negligence, and in order to commit negligence, it must be some act that it does that is not open and obvious to the plaintiff and the company that he is working for.

(363) Here the plaintiff had been a lineman for 22 years. The Hoosier Engineering Company knew that those poles were creosoted, that the crossarms were creosoted. They knew what happened in hot weather, that it gets sticky perhaps, and soft and they knew that these wires were hot wires, so to speak, and loaded with high voltage electricity, and the plaintiff and Hoosier Engineering Company knew just about as much about this particular job as the Ohio Power Company.

So, the court cannot find that there is any negligence on the part of the Ohio Power Company.

There are many cases on this subject and I have been reading these cases and examining them since the progress of this trial, and the court is of the opinion from any num-

ber of these cases, this case must be decided on the cases in Ohio.

Here is a case that was decided rather recently, in May of 1955, by the Supreme Court of Ohio, in which they announce the rule this way:

"It is apparent that this court in the Wellman case limited the rule, earlier announced in the Bosjnak case, to cases where the independent contractor and his employes enter upon the premises of the contractor's employer as his invitees, unaware and uninformed of hidden dangers on the premise which had been created by the (364) employer or of which he had full knowledge. Here Duffy and its employes had consented to work in an obviously dangerous environment, and in so doing it was Duffy's lack of care, under the circumstances, which proximately caused plaintiff's injury. It is to be noted that the work being performed was not directly with reference to construction on or repair of the premises themselves, but was an incidental operation for the benefit of the independent contractor. It was the independent contractor's and not the owner's operation, and it was entirely under the supervision and control of the former."

While there are many cases which announces the rule and the court understands the rule to be, in order to hold the Ohio Power Cmpany, there must be something in the nature of a hidden nature, a latent defect or something that would not be obvious to the plaintiff.

Then, there is a further matter. The court does not desire to attribute any fault to the plaintiff unnecessarily, but I think the rules, as they have been brought out here, require the plaintiff to put on his leather equipment when he reached the peint of primary area, which would be immediately under the wires and not go up through them. The

court finds also that the plaintiff was guilty of contributory negligence or (365) negiigence which would prevent his recovery.

You have sat here three days now and listened to the evidence in this case. I know you have sat sympathetically and interestedly and I felt that I owed you this explanation of what was happening to the case and I am sustaining a motion of the defendant for a directed verdict or for a judgment, and in this case I am going to order the judgment entered be in favor of the defendant without requiring the jurors to sign a verdict.

This will conclude this case and you will now be excused from this particular service and we have other jurors coming in on Monday, so you will have a little time here without being called. I am not sure when you will be called again, but probably in the not too distant future you will be called. I expect to be here for a couple of weeks.

Adjourn court.